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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 142

THE SHOTWELL MANUFACTURING COMPANY (RENAMED HOMAN MFG. CO., INC.), A CORPORATION, BYRON A. CAIN AND HAROLD E. SULLIVAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order and opinion of the District Court denying petitioners' motion to suppress evidence (Pet. 37-54) on the rehearing directed by this Court has not been reported. The order and opinion of the District Court denying petitioners' untimely motions challenging the arrays of the grand and petit juries (Pet. 73-83) is also unreported. The opinion of the Court

of Appeals affirming the judgments of the District Court (Pet. 55-72) is reported at 287 F. 2d 667. The prior opinion of the Court of Appeals, reversing convictions of petitioners on the ground that the trial court erred in denying their motion to suppress evidence, is reported at 225 F. 2d 394. This Court's opinion vacating the judgment below and remanding the cases for further proceedings is reported at 355 U.S. 233.

JURISDICTION

The judgments of the Court of Appeals were entered on February 8, 1961 (Pet. 55), and a timely petition for rehearing was denied on April 11, 1961 (Pet. 2). On April 27, 1961, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to June 9, 1961. (Pet. 2.) The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

Constitution of the United States:

Fifth Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. (1952 ed.) 145(b))

Federal Rules of Criminal Procedure:

RULE 12. PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS

* * * * *

(b) *The Motion Raising Defenses and Objections.*

(1) *Defenses and Objections Which May Be Raised.* Any defense or objection which is capable

of determination without the trial of the general issue may be raised before trial by motion.

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

* * * * *

QUESTIONS PRESENTED

1. Whether petitioners' pre-trial motion to suppress evidence, based on an alleged "voluntary disclosure" of tax derelictions to Treasury officials in reliance upon the Treasury Department's then existing voluntary disclosure policy, should have been granted, notwithstanding the trial court's finding that the alleged disclosure was dishonest, false and fraudulent and was concocted

for the express purpose of concealing petitioners' true tax liability.

2. Whether this Court should re-evaluate the evidence and determine whether Government witnesses gave false testimony in affidavits presented to this Court in support of the motion to remand and at the further hearing on remand of the case to the District Court, despite the express findings to the contrary by the District Court, which held that fraud permeated the showing made by petitioners before it at the original suppression hearing, at the trial and at the supplemental suppression hearing.

3. Whether the trial court, following the further suppression hearing directed by this Court, should have granted a new trial inasmuch as it stated in its opinion, denying suppression of evidence, that it was "entirely probable" that Government witness Lubben, in his testimony at the trial in 1953, "may have exaggerated the amounts of the payments that he and his confederates made to Shotwell."

4. Whether the trial court erred in denying petitioners' motions, filed nearly four years after the verdicts, challenging the arrays of the grand and petit juries.

5. Whether the trial court erred in its instructions to the jury.

STATEMENT

On March 14, 1952, an indictment in two counts was returned in the United States District Court for the Northern District of Illinois, charging petitioners Shotwell Manufacturing Company, a corporation, and the individual petitioners (together with Frank J.

Huebner) as corporate officers with willful attempted evasion of a large part of the corporation's income tax for the years 1945 and 1946. (R. 4-7.)[1] As set forth in the bill of particulars (R. 8-9), the unreported income consisted of premium payments received by the corporation on the sale of candy at prices in excess of the recorded invoice and O.P.A. ceiling prices, and of payments received for wholly unrecorded sales.

Petitioners filed a pre-trial motion to suppress evidence. The motion, as amended (R. 120-127, 144-145), alleged that, in reliance upon a promise of immunity under the then existing voluntary disclosure policy of the Treasury Department, and before any investigation had been initiated, petitioners in 1948 had made a valid disclosure to a Treasury official of the tax derelictions for which they were later indicted. The motion also alleged, and petitioners sought to show in support (R. 131, 150-151, 174-175, 204-207, 215-217, 248, 254, 285, 2579), that the corporation's unreported receipts were offset by unreported (unclaimed) over-ceiling price expenditures for goods purchased and that petitioners had not profited from the transactions.

Following a pre-trial hearing on the motion in 1952 (R. 150-448), the trial court (Judge Nordbye, sitting by special designation of former Chief Justice Vinson) concluded that no good-faith disclosure had been made

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[1] In referring to the record, the Government will adopt the symbols used by petitioners (See Pet. 8, fn. 3). Accordingly, references to the record of the original suppression hearing and the trial will be preceded by "R." References to the record on the supplemental hearing ordered by this Court on petitioners' motion to suppress evidence, printed as an appendix to petitioners' briefs to the Court of Appeals, will be preceded by "App."

and denied the motion to suppress. (R. 447-448, 3242-3247.)

After a five-week jury trial in 1953, petitioners and Huebner were found guilty as charged. (R. 2990.) The corporation was fined $10,000 on each count. The individual petitioners and Huebner were sentenced to imprisonment for three years on each count, the sentences to run concurrently, and were fined varying amounts. (R. 3012, 3015-3016, 3018-3019, 3075, 3221-3224, 3256-3257.)

In 1955, the Court of Appeals (one judge dissenting) reversed the convictions and ordered a new trial on the ground that the motion to suppress should have been granted. In the opinion of the majority of the court (225 F. 2d at p. 403), petitioners "did disclose the *facts*" and the disclosure was timely because it was made before any investigation was initiated. The United States petitioned for a writ of certiorari.

After the petition had been filed, the Department of Justice received information from the Internal Revenue Service that an investigation then in progress indicated that perjured testimony relevant to the issues raised by the motion to suppress had been given at the pre-trial hearing on the motion and at the trial.

The Solicitor General advised this Court of the receipt of this information and thereafter filed a motion to remand the case to the District Court for the taking of further evidence on the suppression issue. The motion to remand, as amended and supplemented, alleged that the newly discovered evidence clearly indicated that the Court of Appeals' decision sustaining

the motion to suppress was based on a perjurious record attributable to the fraud of petitioners.

This Court (355 U.S. 23) granted the petition, vacated the judgment of the Court of Appeals and remanded the case to the District Court. Its instructions were to hold a further hearing on the suppression issue; to make such new findings on this issue as might be appropriate in light of the further evidence and the entire existing record; and either to enter new final judgments or to grant a new trial.

A three-week supplemental hearing on the suppression issue was held by the District Court in December 1958. Defendant Huebner, who had not been a witness at the original suppression hearing or at the trial, testified as a Government witness,[2] particularly in relation to the receipt and disposition of the Shotwell Company's unreported income for 1945 and 1946. His testimony showed that the corporation received payments in currency from David Lubben, between November 1944 and December 1946, for merchandise sold to Lubben or his companies. These payments by Lubben represented (1) premium payments in excess of the prevailing O.P.A. ceiling prices at which the merchandise was invoiced and (2) payments for shipments of merchandise which were not invoiced at all. Huebner recounted seventeen occasions on which he personally received such payments from Lubben, those payments totaling about $300,000. In addition, Huebner testified that he directed Shotwell employees Roeser, Grathund

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[2] Huebner later withdrew his plea of not guilty and entered a plea of guilty. (App. 1800-1801.)

and Mrs. Morrill to receive cash payments from Lubben. Although much of the money received by Roeser and Graflund was used by the corporation for the purchase of corn in the black market,[3] the currency received by Huebner was divided among Cain, Sullivan and himself. Thus, of the $300,000 in currency which Huebner received from Lubben, Huebner retained about $45,000 for his own use; while the balance, roughly $250,000, went into the pockets of petitioners Cain and Sullivan.[4] (App. 561-642.)

There also was evidence at the supplemental hearing of petitioners' attempts to "fix" the tax case in the summer of 1948—attempts which necessarily involved the corruption of Internal Revenue personnel (App. 683-689, 1071-1075, 1344-1366, 1520-1533)—and of their efforts to thwart the investigation being conducted by the Internal Revenue Service through destruction of evidence and concealment of information (App. 682, 689-691, 1076-1082).

On April 15, 1959, the District Court issued new findings of fact and conclusions of law and entered an order again denying the motion to suppress evidence. (Pet. 37-54.) Among other things, the court found that

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[3] Roeser and Graflund testified at the trial that Lubben delivered certain cash payments to them, beginning in the fall of 1945. Their testimony, and that of Mrs. Morrill, was that these payments were either paid out immediately to procure corn on the black market or were placed in the company vault and later expended for that purpose. (R. 780-782, 1700-1709, 1717-1722, 1731-1734, 1737, 1740-1742, 1780-1789.)

[4] In testimony given at the original suppression hearing and at the trial, both Cain and Sullivan denied that they personally had received any of the cash paid by Lubben. (R. 256, 264-269, 2638, 2654, 2671.)

(*id.*, p. 42) "the evidence is overwhelmingly clear that not only were substantial sums of black-market money paid to Shotwell as premium payments by Lub'en during 1944, 1945 and 1946 totaling between three and four hundred thousand dollars, but also that the greater part of this so-called black-market money was appropriated by Cain, Huebner and Sullivan for their own personal use;" that (*id.*, p. 49) "[i]n representing to the Government that all of the premium payments to Shotwell were expended for raw materials, these defendants made a dishonest, false and fraudulent disclosure * * * concocted for the express purpose of misleading the tax officials;" that (*id.*, p. 50) "the record now persuasively establishes that the defendants never did disclose the true facts to the Treasury Department;" that (*id.*, pp. 53-54) "fraud permeated the showing made by these defendants before me at the original suppression hearing, as well as at the trial and the supplemental hearing;" and that (*id.*, p. 54) "no honest, bona fide voluntary disclosure to any government official ever was made by Shotwell or these defendants with respect to Shotwell's 1945 and 1946 taxes as contemplated by the voluntary disclosure policy in existence at the time." The court concluded as a matter of law that (*id.*, p. 54) a "dishonest and false disclosure cannot be held to be a timely voluntary disclosure."

On May 22, 1959, the District Court entered new judgments of conviction which, so far as petitioners are concerned, were the same as those entered origi-

nally in 1953.[5] (App. 1797-1811.) The convictions were affirmed by the Court of Appeals, the court holding, *inter alia*, that petitioners' motion to suppress evidence was properly denied. (Pet. 55, 60.)

ARGUMENT

1. Petitioners' primary contention (Pet. 20-24) is that the evidence of unreported receipts which they furnished the Government, allegedly in reliance on the Treasury Department's former voluntary disclosure policy, should have been suppressed. But petitioners, on the facts found, had no basis for claiming the benefits of that policy—a policy which offered immunity from prosecution in return for full disclosure of tax derelictions. The information disclosed by petitioners was designed to *conceal* the true tax liability of the Shotwell corporation, for it was represented to Treasury officials that *almost all* of Shotwell's unreported receipts had been spent for purchase of raw materials, whereas in fact only a small proportion of the unreported income had been so expended. (*Supra*, pp. 8-9.) As the District Court found (Pet. 37, 49) after a protracted evidentiary hearing, the disclosure was dishonest, false and fraudulent, and was concocted for the very purpose of misleading the Treasury Department.

In its opinion in this case, this Court observed that the voluntary disclosure policy contemplated taxpayers

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[5] Huebner was sentenced to three years imprisonment, execution of which was suspended, and was fined $5,000. (App. 1804, 1807-1808.)

making "a clean breast of things to the Treasury"; it directed a further hearing in order to resolve the issue whether a bona fide disclosure had in fact been made. (355 U.S. at pp. 235, fn. 2, 242, 245, fn. 21.) Certainly, then, it is unnecessary to argue that false statements and fraudulent representations to the government, in the guise of a voluntary disclosure, could not come within any permissible interpretation of the former voluntary disclosure policy. A "disclosure" which conceals and deceives is neither a disclosure nor bona fide.[8] Cf. *In re Monroe*, 110 F. Supp. 507 (N.D. Tex.), affirmed, 215 F. 2d 81, certiorari denied, 348 U. S. 914; *Bateman v. United States*, 212 F. 2d 61, 65-66 (C.A. 9th); *Whiskey Cases*, 99 U. S. 594.

The Fifth Amendment issue sought to be raised by the petition is not presented by the facts of this case. The decisions upon which petitioners rely involve prisoners (or suspected persons under questioning) from whom confessions were obtained by overreaching on the part of enforcement officials. Thus, in *Bram v. United States*, 168 U. S. 532, 561, an accused murderer was taken to a detective's office and questioned while stripped of his clothing; and in *Rogers v. Richmond*, 365 U. S. 534, 535-536, another accused murderer was told that his arthritic wife would be arrested and

[8] Petitioners again assert (Pet. 9, 11, 13) that whether the unreported income was actually paid out for raw materials or not would make no difference in the additional taxes to be paid by the Shotwell corporation. This is not true. See Judge Nordbye's opinion on the remand (Pet. 48-50); and see the Government's original petition for certiorari in this case (pp. 18-19), and its reply brief to the opposition (pp. 3-4), No. 470, O. T. 1955.

brought to the police station if he did not confess. In cases of this kind the question is "whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined * * *." *Rogers* v. *Richmond*, 365 U. S. 534, 544.

There was no conduct even remotely comparable leading to the revelations in this case. A public offer was made to all taxpayers; and petitioners, who had not even been accused, voluntarily came forward and admitted unreported receipts.[7]

The overreaching here was on the part of petitioners, who wished to avail themselves of the offer of immunity and yet evade, by a new falsification, payment of the taxes which the immunity offer was designed to collect.[8] This, therefore, is a case in which the record clearly establishes that petitioners' revelations were not induced by "constitutionally impermissible methods". *Rogers* v. *Richmond*, *supra*, at 541.

2. Petitioners' charge (Pet. 4-6, 13-18, 25-28) that

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[7] See also *Hardy* v. *United States*, 186 U. S. 224, 229; *Ziang Sung Wan* v. *United States*, 266 U. S. 1, 14; and *Smith* v. *United States*, 348 U. S. 147, 150, which are cited in the dissenting opinion to this Court's previous decision in this case. *Shotwell* v. *United States*, 355 U. S. 233, 248.

[8] Judge Nordbye found that "petitioners had been in no way misled by representatives of the Government as to the effect of their disclosures." (R. 3246; and see original petition for certiorari in this case, *supra*, p. 23.)

[9] Petitioners' reliance (Pet. 23) on *Rex* v. *Barker*, 2 K.B. 381, is misplaced. The full report of that case, 3 All E. R. 33 (1941), reveals that the taxpayer there, unlike petitioners, ultimately did make a timely disclosure of the full extent of the fraud perpetrated on the revenue.

government witnesses, through pressures exerted upon them, were induced to give false testimony at the supplemental suppression hearing and in affidavits (those of Huebner and Graflund) presented earlier to this Court in support of the motion to remand. They allege that what the supplemental hearing really established is not that fraud permeated the showing made by them, as the courts below have found, but, rather, that this Court's remand order was induced by fraud on the part of the United States.

Petitioners attempted to justify these charges in the District Court (see their argument to the court, App. 1676-1742), but the court found them baseless. In his opinion and order, Judge Nordbye stated that he did not believe any government official had attempted to have any witness testify falsely; that there was no foundation for the suggestion the government witnesses were trying to "frame" petitioners; that Huebner's candid and self-incriminating admissions lent credence to the government's position that he was trying, to the best of his ability, to tell the full story; and that Graflund was attempting to tell the truth as he remembered the events. (Pet. 37, 52-53.) Furthermore, contrary to the statements in the petition (pp. 26-27), Judge Nordbye *did* find that Sauber, Busby and Cain had testified falsely in many respects as to the time and the manner of the alleged disclosure. (Pet. 42-48.) The Court of Appeals stated (Pet. 55, 60) that "[t]he district court on remand clearly considered relevant testimony of the defendants untrue and in effect absolved the affidavits of Huebner and Graflund of the charge of fraud."

What petitioners now seek is to have this Court weigh the evidence and determine the credibility of witnesses. The Court has repeatedly stated that it will not do so. *Glasser* v. *United States*, 315 U. S. 60, 80; *Stilson* v. *United States*, 250 U. S. 583, 586; *Goldman* v. *United States*, 245 U. S. 474, 477; *United States* v. *Johnston*, 268 U. S. 220, 227.

3. Petitioners contend (Pet. 12-13, 28-32) that Judge Nordbye found, upon the evidence at the supplemental hearing, that the testimony of Lubben, the government's principal witness at the trial, was outrageously false on a critical issue, *i.e.*, the amount of black-market payments to Shotwell which was not reported in the corporate returns. They contend that they are, therefore, entitled to a new trial.

At the trial the government proved that these payments amounted to about $450,000. (R. 1838-1840, 1844-1846.) Petitioners assert that the new evidence established that the amount was only $234,000. They state further that this "was the figure asserted by the prosecutors to Judge Nordbye". (Pet. 29).

The government made no such assertion in the supplemental proceedings, and petitioners, so far as we can ascertain, have obtained the figure by a miscalculation based solely upon payments which Huebner testified he personally received directly from Lubben.[10]

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[10] Huebner received other payments from individuals acting in Lubben's behalf. (App. 603-605, 629-633, 640-641.) Furthermore, there were many other very substantial payments by Lubben to other Shotwell officials, Rosser and Graflund. (R. 1701-1707, 1740-1741.) These are apparently ignored in petitioners' figure of $234,000.

The government, indeed, made no effort, during the proceedings on remand, to establish the total of Shotwell's black-market receipts; that was not in issue. Its duty, under this Court's mandate (355 U.S. at pp. 239-242, 245, fn. 21), was to show that the alleged voluntary disclosure either was not timely or was not bona fide. At the outset of the hearing, the prosecutor stated (App. 541):

> The only evidence that the Government proposes to adduce before this Court is evidence controverting the defendant's motion to suppress. The Government has no intention of ascertaining or asking this Court to ascertain what Shotwell's tax liabilities were, is or might have been.

Petitioners' insistence on the figure of $234,000 has no basis in the record. In fact, petitioner Cain himself testified at the pre-trial suppression hearing that the black-market receipt figures submitted in Shotwell's alleged voluntary disclosure (over $366,000 for 1945 and 1946) "were as accurate as is possible to make them." (R. 258-261, 3096; Pet. 85.)

But petitioners, relying upon a few phrases from the lengthy opinion on the remand (Pet. 37-54), contend that Judge Nordbye has now found that the testimony on which the verdicts rest is outrageously false and that Huebner's testimony shows that Lubben lied at least to the extend of $132,000. We submit that this is a distortion of Judge Nordbye's meaning. His comment that Lubben "may have exaggerated" (Pet. 41) the amounts of his payments must be read in context.

In the opinion, after noting that the events in question had happened fourteen years ago, that the black-market transactions were complicated and numerous, and that Shotwell, Huebner and petitioners had kept no records, Judge Nordbye said (Pet. 11-12):

> * * * Consequently, it is perfectly understandable that when a witness like Huebner attempts to recount the some sixteen instances when he received substantial sums of money on behalf of Shotwell as over-ceiling payments on candy sold by that company, the amounts and circumstances as to the disposition of the money may not be too clear in his memory. However, the testimony he has given at the supplemental hearing is *reasonably consistent and compatible with the testimony given by the government witnesses at the trial* regarding these payments. * * * Huebner may be mistaken as to the exact amounts of money received and when the payments were made. Moreover, that Lubben may have exaggerated the amounts of the payments that he and his confederates made to Shotwell is entirely probable. But the evidence is overwhelmingly clear that not only were substantial sums of black-market money paid to Shotwell as premium payments by Lubben during 1944, 1945 and 1946 totaling between three and four hundred thousand dollars, but also that the greater part of this so-called black-market money was appropriated by Cain, Huebner and Sullivan for their own personal use. * * * [Emphasis added.]

In other words, Judge Nordbye indicated that, as a result of the lapse of time, the absence of records and the complicated nature of the events, both Huebner and Lubben, though generally in agreement, were probably mistaken as to some details.[11]

This is also confirmed by Judge Nordbye's subsequent comment when a motion for new trial, based upon petitioners' present contention, was vigorously pressed upon him. (App. 1774-1796.) After listening to lengthy argument, he said (App. 1790):

> I don't find there is any variance except I think it is much more clear on the suppression hearing as to where this money went to.
>
> We had Lubben's testimony at the trial and other circumstantial evidence, but, now we have Lubben's [Huebner's] testimony which has given much light as to where this money that was paid to Shotwell was diverted. * * *[12]

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[11] It stands to reason that Lubben, who kept records, would be more likely to recall the transactions with accuracy than would Huebner, who kept no records at all. Huebner's general statement that Lubben "lied on the stand" (Pet. 29) came during the third day of a merciless badgering on cross-examination, and was followed immediately by a statement that Lubben had made a "mistake" as to one particular transaction. (App. 692-809.) Evidence as to alleged "doctoring" of Lubben's records by Tobias (Pet. 12, 29) was nothing new. It had been developed at great length at the trial and was disregarded by the jury. (R. 2556-2557, 2613-2618, 2678-2679.)

[12] The second reference to Lubben is an obvious slip. It was Huebner who testified as to disposition of the money. See the pertinent passage in Judge Nordbye's opinion. (Pet. 41.)

We also note that during the supplemental investigation numerous statements were taken by the Government from the witnesses Huebner, Graflund and Linna. These, together with the grand jury transcripts, were turned over to petitioners for pur-

1. Petitioners claim (Pet. 32-35) that the trial court erred in denying the motions they filed in July 1957 (App. 15-16, 111-115), nearly four years after the verdicts, challenging the arrays of the grand and petit juries. The moving papers alleged, in substance, that the panels were selected through discriminatory and illegal practices followed by the Clerk of the District Court and the Jury Commissioner, including unlawful delegation of the powers of the Jury Commissioner.

The trial court, after a full hearing (App. 312-373), held that any right of petitioners to challenge the jury panels had been waived by their failure to raise the issue before trial, and that petitioners had failed to make any showing of prejudice which would justify the court in granting relief from the waiver. (Pet. 76-77.) The court's ruling was clearly correct, for petitioners waived any rights they might have had to question the constitution of the grand and petit juries by their failure to comply with Rule 12, Federal Rules of Criminal Procedure, *supra*, pp. 3-4. *Scales* v. *United States*, No. 1, O.T. 1960, decided June 5, 1961; *United States* v. *Clark*, 276 F. 2d 647, 654 (C. A. 7th), reversed on other grounds, 365 U. S. 312; *Miranda* v. *United States*, 255 F. 2d 9, 16 (C. A. 1st); *Batsell* v. *United States*, 217 F. 2d 257, 259 (C. A. 8th); *United States* v. *Klein*, 210 F. 2d 217, 220 (C. A. 2d); *Ford* v. *United States*, 201 F. 2d 300 (C. A. 5th). Furthermore,

poses of cross-examination. After both sides had rested, the Government offered to turn both the statements and the grand jury transcripts over to Judge Nordbye to aid him in determining whether the testimony of the witness was inconsistent. Counsel for petitioners objected. (App. 1638-1642, 1748-1749; and see Judge Nordbye's comment, Pet. 53.)

petitioners do not even contend that they suffered actual prejudice, and the trial court, in its detailed opinion (Pet. 73-83), demonstrates that the methods used in the selection of jurors did not result in the exclusion of any class or in the composition of juries which were not truly cross-sections of the community.

5. Finally, petitioners state (Pet. 35-36) that the jury was instructed it might consider evidence against Sullivan which had been ruled inadmissible as to him, and that the jury "in effect was told that defendants had not acted in good faith because their disclosure had not given them immunity."

Petitioners do not attempt to identify the particular instructions of which they complain, and examination of the charge in its entirety (R. 2947-2983) discloses no basis for their contentions. The trial court specifically instructed the jury (R. 2970-2971) that evidence which had been ruled inadmissible against a defendant was not to be considered against him. Petitioners themselves requested an instruction (R. 3210) that the jury could take into account, as bearing on the issue of intent, the actions of petitioners pursuant to the voluntary disclosure policy. The jury was so instructed (R. 2969-2970) and petitioners took no exception (R. 2983-2989).[13]

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[13] Whatever may be the role of the jury in passing on the admissibility of a defendant's disclosures, the issue does not arise on this record. Both at the pre-trial suppression hearing (R. 27, 28, 29-30) and at the trial (R. 2738-2741, 3209-3210), petitioners specifically and repeatedly waived submission of the issue to the jury. See footnote 19 of this Court's opinion remanding the case, 355 U. S. at 244.

CONCLUSION

The decision of the Court of Appeals affirming the convictions is correct, and no conflict of decisions or important question of law is involved. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST, 1961.

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